IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944.

No. _____

HONORABLE PEIRSON M. HALL,
Judge of the United States
District Court for the
Southern District of
California,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF HONORABLE PEIRSON M. HALL, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

I

THE OPINIONS OF THE COURTS BELOW.

Full references to the opinions of the United States Circuit Court of Appeals for the Ninth Circuit (145 F. (2d) 781) and to the decision of the District Court referred to therein (54 F. Supp. 867) are given in the

petition under "A. The Opinions of the Courts Below"; and petitioner requests leave, in the interest of brevity, to incorporate that portion of the petition by reference here.

II

JURISDICTIONAL STATEMENT.

The jurisdiction of this Honorable Court to review the cause by writ of certiorari is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1; 43 Stat. 938; 28 U.S.C.A. § 347(a).

III

STATEMENT OF THE CASE.

A statement of the case is set forth in the opinion (R. 91-94) of the Circuit Court of Appeals, which is reported in 145 F. (2d) at pages 782-783, and in Appendix A attached hereto; and petitioner requests leave, in the interest of brevity, to incorporate by reference that portion of the opinion into this brief.

IV

SPECIFICATION OF ERRORS.

(1) The Circuit Court of Appeals erred in holding that the Attorney General of the United States has the power to open a branch office in any district and thus circumvent or disestablish the office of United States District Attorney as the law office for the United States in such district (R. 92-93).

(2) The Circuit Court of Appeals erred in holding that the Attorney General of the United States has the power to assign the prosecution of condemnation cases in a given district to one of his special assistants and the latter's staff of special attorneys, to be handled independently of the office of United States District Attorney in such district (R. 94, 96).

(3) The Circuit Court of Appeals erred in holding that a special assistant to the Attorney General may stipulate to a money judgment against the United States in a condemnation case (R. 95, 98).

V

SUMMARY OF THE ARGUMENT.

A. It is the specific statutory duty of the United States District Attorney to institute and prosecute land condemnation proceedings.

B. The Attorney General has no authority to circumvent or disestablish the office of District Attorney by opening a branch office of the Department of Justice in the district.

C. The decision of the Circuit Court of Appeals at bar is believed to be in conflict with the decision of the Court of Appeals for the District of Columbia in Moody v. Wickard, 136 F. (2d) 801 (cert. denied 320 U. S. 775, 64 S. Ct. 89, 88 L. ed. (Adv. Ops.) 46 (1943)).

VI

ARGUMENT.

A. It is the specific statutory duty of the United States District Attorney to institute and prosecute land condemnation proceedings.

The Act of September 24, 1789, states the duties of the United States District Attorney as follows:

> "It shall be the duty of every district attorney to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury." (1 Stat. 92, C.20, § 35; R. S. 771; 28 U.S.C.A. § 485.)

In United States v. Johnson, 173 U. S. 363 376-377 (19 S. Ct. 427; 43 L. ed. 731, 736 (1899)), this Court said:

> "We are of the opinion that within the

reasonable meaning of that section (28 U.S.C.A. §485) the proceedings instituted in the Federal court by District Attorney Johnson to condemn the lands in question for the benefit of the United States constituted a civil action in which the government was concerned; and that in following the directions of the Attorney General to institute such proceedings and have the lands referred to condemned for the United States he was only discharging an official duty imposed upon him by statute."

Moreover, on March 2, 1889, Congress enacted a statute now Section 256 in Title 40 of the United States Code, as follows:

"All legal services connected with the procurement of titles to site for public buildings, other than for life-saving stations and pierhead lights, shall be rendered by United States district attorneys; Provided, That in the procurement of sites for such public buildings, it shall be the duty of the Attorney General to require of the grantors in each case to furnish, free of all expenses to the Government, all requisite abstracts,

official certifications and evidences of title that the Attorney General may deem necessary." (25 Stat. 941; 40 U.S.C.A. § 256.)

Thus, it is the clear statutory duty of the District Attorney to prosecute condemnation cases in his capacity as the law officer for the United States in his particular district. The Attorney General himself has so construed Section 256 of Title 40. (Instructions to United States Attorneys etc. (1929) §§ 1115-1117, p. 189; § 975, p. 169; §§ 985-987, pp. 170-171.)

Contrary to the opinion of the Circuit Court of Appeals in the case at bar (R. 92), we submit that the District Attorney cannot, by "assent", relieve his office of the prosecution of all condemnation cases. That is a function which may be separable from the man, but is inseparable from the office.

Congress imposed the duty; and Congress alone can relieve the office of United States Attorney from it.

B. The Attorney General has no authority to circumvent or disestablish the office of District Attorney by opening a branch office of the Department of Justice in the district.

That the district attorney is the law officer of the United States in his district cannot be doubted. This is true both in a statutory (R.S. §§767,769; 28 U.S.C.A. §§481-482) and in a constitutional sense. Thus the presidential appointment of a district attorney must be confirmed by the Senate (U. S. Const., Art. II, §2, cl.2). He is, then, much more than a mere deputy or assistant to the Attorney General. He is independently appointed and confirmed as an officer of the United States - a resident of his district conversant with local affairs.

The Attorney General exercises "general superintendence and direction" over district attorneys, but only "as to the manner of discharging their . . . duties." (R.S. §362; 5 U.S.C.A. §317.) Congress has never conferred upon the Attorney General the power entirely to relieve the office of district attorney from duties imposed by statute.

During the first part of the present war period, special assistants to the Attorney General conducted all condemnation cases in the Southern District of California in association with the office of the District Attorney. The District Attorney appeared of record in all cases, and all pleadings contained his signature (R. 91-92).

Then, on September 1, 1943, pursuant to a "directive" from the Attorney General, prosecution of all condemnation cases was separated from the office of the District Attorney in the Southern District of California (R. 92). In Los Angeles there was opened an "office" of the "Lands Division, Department of Justice" (R. 92), and a special assistant to the Attorney General and his "staff" of special attorneys took full charge of all condemnation cases.

This circumvention of the office of District Attorney is sought to be justified under the provisions of the Act of June 30, 1906 (34 Stat. 816; 5 U.S.C.A. §310) which reads:

> "The Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought." (Underscoring added.)

The "provision of law" referred to in Section 310 is manifestly Section 312 of Title 5 U.S.C.A. (R.S. §363) which provides that:

> "The Attorney General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties . . ." (Underscoring added.)

There is nothing in Section 310 permitting the establishment of an "office" of the Lands Division in Los Angeles separate and apart from the office of District Attorney. Indeed, the very purpose of Section 310 was to allow the wider use of special assistants to the Attorney General "to assist the district attorneys in the discharge of their duties" (5 U.S.C.A. §312; R.S. §363).

As the court said in United States v. Sheffield Farms Co., 43 F. Supp. 1, 3 (D.C.S.D.N.Y., 1942):

> "An examination of the legislative history of Section 310 indicates that its passage in June, 1906, resulted from the decision in United States v. Rosenthal, 121 F. 862, decided on March 17, 1903, by the Circuit

Court, S.D., N.Y., which held that neither the Attorney General, nor his special assistants, nor any officer of the Department of Justice were authorized to conduct or aid in the conduct of proceedings before a Grand Jury, and that only the United States District Attorney had such authority. (See House Report No. 2901, 59th Congress, 1st Session).

Mr. Gillette, in the House Report said:

"'The purpose of this bill is to give to the Attorney General or to any officer in this Department or to any attorney specially employed by him, the same rights, powers and authority which district attorneys now have or may hereafter have in presenting and conducting proceedings before a grand jury . . .'

"'The Attorney General states that it is necessary . . . that he shall be permitted to employ special counsel to assist the district attorney . . . in cases of unusual importance to the Government, and that such counsel be permitted to possess all of the power and authority, in that particular case, granted to the district attorney which, of course, includes his

right to appear before a grand jury either with the district attorney or alone.

"'It seems eminently proper that such power and authority be given by law. It has been the practice to do so in the past and it will be necessary that this practice shall continue in the future.'" (Underscoring added.)

It is going far afield from remedying the decision in United States v. Rosenthal, 121 F. 862 (Cir. Ct. S.D.,N.Y., 1903) to say that Section 310 means that the Attorney General has the power to reduce to a nullity the office of District Attorney in any district. If the Attorney General can establish a branch office in Los Angeles and thus supplant the District Attorney's office in part, he may by the same process supplant it in toto.

This Honorable Court has never ruled upon the extent of the added powers given the Attorney General by Section 310. Nor was the question necessary to the decision in Sutherland v. International Ins. Co. of N. Y., 43 F. (2d) 969, 970 (C.C.A. 2nd, 1930) upon which the Circuit Court of Appeals seems to rest the decision in the case at bar (R. 96-97).

In the Sutherland case Judge Learned Hand reviewed the statutes and the meager case law relating to the representation of the United States in the courts, saying

(43 F. (2d) at pages 969-971):

"Section 485 of title 28 of the U. S. Code (28 USCA § 485), which had its origin in the Act of September 24, 1789, provides that 'it shall be the duty of every district attorney to prosecute, in his district . . . all civil actions in which the United States are concerned.' This was enlarged in 1906 (title 5, U. S. Code, § 310 (5 USCA § 310)), to include the Attorney General, 'any officer of the Department of Justice,' or attorney specially designated by the Attorney General . . . The Confiscation Cases, 7 Wall. 454, 19 L. Ed. 196, indeed involved only the question whether the Attorney General might, against the wishes of an informer, dismiss an appeal in a suit to confiscate confederate property under the Act of August 6, 1861 (12 Stat. 319), in which the informer had a half interest. However, the opinion announced obiter (page 457 of 7 Wall.) that it was the settled rule of United States courts to recognize no suits prosecuted in the name and for the benefit of the United States unless it was represented by a district attorney. While this is perhaps not conclusive, as it was not in any sense

made the basis of the decision, it cannot be disregarded, even though the citations given as authority, except a dictum of Judge Betts in U. S. v. McAvoy, 4 Blatch. 418, Fed. Cas. No. 15,654, do not bear out the text. Moreover, Justice Livingstone so ruled in U. S. v. Morris, 1 Paine, 209, Fed. Cas. No. 15,816, and so did Justice Blatchford in U. S. ex rel. West v. Doughty, 7 Blatch. 424, Fed. Cas. No. 14,986. So far as we can find these are the only cases which have dealt with the question for although U. S. v. Morris was affirmed in 10 Wheat. 246, 6 L. Ed. 314, the point was not discussed.

. . .

"While the authority is thus somewhat meagre, and the Supreme Court has never actually ruled upon it, the reasons are strong to take such a view. The government has provided legal officers, presumably competent, charged with the duty of protecting its rights in its courts. It has specifically authorized these to act, exacting from them compliance with the formalities required of a public officer, even when appointed by the Attorney General. . . . The Attorney General has powers of 'general superintendence

and direction' over district attorneys (title 5, U. S. Code, § 317 (5 USCA § 317)), and may directly intervene to 'conduct and argue any case in any court of the United States' (title 5, U. S. Code, § 309 (5 USCA § 309)), including even proceedings before magistrates (title 5, U. S. Code, § 310 (5 USCA § 310)). Thus he may displace district attorneys in their own suits, dismiss or compromise them, institute those which they decline to press. No such system is capable of operation unless his powers are exclusive, or if the Departments may institute suits which he cannot control. His powers must be coextensive with his duties. And so, quite aside from the respectable authority that confirms our view, we should have had no doubt that no suit can be brought except the Attorney General, his subordinate, or a district attorney under his 'superintendence and direction,' appears for the United States." (Underscoring added.)

The opinion in the case at bar stresses Judge Hand's statement that the Attorney General may "displace district attorneys in their own suits, dismiss or compromise them, institute those which they decline to press." (R. 96-97.)

But it seems obvious from a full reading of Judge Hand's opinion that the words just quoted are but obiter dicta. Moreover, they do not support the contention that Section 310 empowers the Attorney General to establish a branch office in a district and supplant the office of the district attorney in such district.

We submit that more than a mere inference should exist to support a holding that Congress intended, by its enactment of Section 310 in 1906, the Attorney General should possess the power to reduce the office of United States District Attorney to a nullity in any district he might choose.

At the outset of the condemnation activities in the Southern District of California, as we have seen (R. 91-92), the Attorney General correctly interpreted Section 310 by providing for his special assistants to work in conjunction with and through the office of the District Attorney.

We submit that such was the intention of Congress in the enactment of Section 310; and we submit also that before the Attorney General may properly send forth special assistants into any district to function entirely independent of the office of the District Attorney in such district, there should be further action of Congress expressly granting such power.

c. The decision of the Circuit Court of Appeals at bar is believed to be in conflict with the decision of the Court of Appeals for the District of Columbia in Moody v. Wickard, 136 F. (2d) 801 (cert. denied 320 U. S. 775, 64 S. Ct. 89, 88 L. ed. (Adv. Ops.) 46 (1943)).

The writ of mandamus which the Circuit Court of Appeals has ordered to issue in the proceeding at bar would compel the respondent as District Judge to accept as valid a stipulation for judgment "in the land action referring to Tracts 21 and 22" (R. 93). This stipulation, providing for a money judgment directing payment of a portion of the funds deposited by the United States in the registry of the court, was signed on behalf of the United States by "Irl D. Brett, Special Assistant to the Attorney General" (R. 93).

Before this stipulation for judgment was presented to the respondent, the Secretary of War had signed and filed a "declaration of taking" as provided in 40 U.S.C.A. § 258a (adopted February 26, 1931, 46 Stat. 1421, C 307, § 1); and had deposited in the registry of the court "the sum of money estimated by said acquiring authority to be just compensation for the land taken."

Section 258a provides in part:

"Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount

of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. . . . "Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the

amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

"Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable."

(Underscoring added.)

In the language of the Court of Appeals of the District of Columbia in Lee et al. v. United States, 58 F. (2d) 879, 880 (1932):

"These provisions, when carried into effect, followed by the taking of the property, amount to a pledge of the public faith and credit, and the judgment rendered in such proceeding is as binding on the United States as a judgment in a proper case would be upon the humblest individual in the land."

No extended argument is necessary to demonstrate that power in a Special Assistant to the Attorney General to stipulate separate judgments payable from the funds deposited in the registry of the court includes also the power in effect to stipulate a money judgment against the United States "for the amount of the deficiency." For if such power exists to stipulate away the funds deposited in the registry, that power necessarily includes the power, improvidently or otherwise, to render the United States liable for a deficiency limited only by the total "compensation finally awarded in respect of such lands."

In the words of United States v. Chemical Foundation, 272 U. S. 1, 20-21, 47 S. Ct. 1, 71 L. ed. 131, 145 (1926):

> "But no statute authorises . . . the Attorney General or other counsel in the case to consent to such a judgment. No such authority is necessary for the proper conduct of litigation on behalf of the United States, and there is no ground for implying that authority."

As the Court pointed out in Moody v. Wickard, supra, 136 F. (2d) 800, 803:

> " . . . the condemnation here was under the general condemnation statute, 40 U.S.C.A. §§ 257, 258. This statute nowhere permits an officer of the United States to consent to

the entry of a money judgment against the Government. United States v. Boston C. C. & N. Y. C. Co., 1 Cir., 271 F. 877."

See, also:

Steele v. United States, 113 U. S. 128, 5 S. Ct. 396, 28 L. ed. 952 (1885);

Bradford v. United States, 228 U. S. 446, 33 S. Ct. 576, 57 L. ed. 912 (1913);

United States v. Crary, 1 F. Supp. 406, 415 (D.C.W.D. Va. 1932).

Section 258a clearly contemplates that the court - and not some special assistant to the Attorney General - shall make a judicial ascertainment and determination of both (1) the amount of compensation to be paid for a given interest, and (2) the persons to whom such compensation shall be paid. Manifestly, the statute does not empower a special assistant to the Attorney General - or even the Attorney General himself - to relieve the court of the necessity of performing that judicial function by merely signing a stipulation.

It is no doubt quicker and more "efficient" to execute a stipulation stating the names of the persons who the special assistant has decided shall receive the money and how much shall be paid to each. But the statute nowhere authorizes such an obviously dangerous short cut.

The only provision in the statute dealing with the power of the Attorney General to stipulate is 40 U.S.C.A. § 258f (adopted Oct. 21, 1942, 56 Stat. 797, C. 618) which provides:

> "In any condemnation proceeding instituted by or on behalf of the United States, the Attorney General is authorized to stipulate or agree in behalf of the United States to exclude any property or any part thereof, or any interest therein, that may have been, or may be, taken by or on behalf of the United States by declaration of taking or otherwise."

If Congress had intended in 1942 to empower the Attorney General to fix by stipulation the amount of compensation to be paid, and to designate the persons entitled to receive payment, it seems certain such an important subject would have been included in Section 258f.

We therefore submit that the Circuit Court of Appeals, in directing that a writ of mandamus issue in the case at bar ordering the respondent District Judge to accept a stipulation for a money judgment, has not only "rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter," but

has also "decided a federal question in a way probably in conflict with applicable decisions of this Court."

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers, and that to such an end a writ of certiorari should be granted and this Honorable Court should review the decision of the United States Circuit Court of Appeals for the Ninth Circuit and finally reverse it.

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